7 PERC ¶ 14226

MOUNT SAN ANTONIO COMMUNITY COLLEGE DISTRICT

California Public Employment Relations Board

Mount San Antonio College Faculty Association, CTA/NEA, Charging Party, v. Mount San Antonio Community College District, Respondent.

Docket No. LA-CE-133

Order No. 334

August 18, 1983

Before Gluck, Chairperson; Tovar, Jaeger, Morgenstern and Burt, Members

Unilateral Change -- Unit Work Assigned To New Classification Outside Unit -- Increase In Employees' Hours -- -- 43.46, 43.54, 43.91, 72.63 Although school district was not obliged to bargain concerning creation of new position to perform new duties, district violated its duty to bargain in good faith during reorganization of instructional departments by unilaterally assigning administrative duties previously performed by department chairpersons to newly created position of division chairperson. In addition, district violated its duty to bargain by unilaterally increasing workload and hours of department chairpersons.

APPEARANCES:

Robert M. Dohrmann, Attorney (Schwartz, Steinsapir, Dohrmann and Krepack) for Mount San Antonio College Faculty Association, CTA/NEA; Patrick D. Sisneros, Attorney (Wagner & Wagner) for Mount San Antonio Community College District.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mount San Antonio College Faculty Association (Association) to a hearing officer's proposed decision [see 2 PERC 2213 (1978)] dismissing its charges that the Mount San Antonio Community College District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).1

In its charges, the Association alleged that the District violated its duty to negotiate in good faith by unilaterally implementing a staff reorganization plan. That plan created the new position of "division chairperson" and transferred some of the administrative duties previously performed by department chairpersons to non-unit employees employed in the new positions. As a result of the plan, department chairpersons, some of whom were full-time administrators and some of whom taught part-time and performed administrative duties part-time, were assigned to teach full time. In addition, the District modified the stipends that department chairpersons received.

The Association initially alleged that this conduct constituted an unlawful unilateral change in violation of subsections 3543.5(c) and (b). In addition, it alleged that the District's conduct independently violated subsections 3543.5(a) and (d). The hearing officer dismissed the subsection 3543.5(a) and (d) allegations prior to the commencement of the hearing. The Association does not except to the dismissal of those charges.

The hearing officer found that the District violated subsection 3543.5(c) when it refused to negotiate with the Association concerning the change in the monthly stipend of department chairpersons.2 He dismissed all the other allegations asserted by the Association to have

constituted unlawful unilateral changes.

The Association excepts to the proposed decision, arguing that the unilateral change in the duties of department chairpersons and their assignment to full-time teaching duties constituted a violation of the duty to negotiate in good faith. The Association further excepts to the hearing officer's failure to order the District to negotiate the impact of its reorganization plan on matters within the scope of representation.

We affirm the hearing officer's decision in part and reverse it in part consistent with the discussion below.

FACTS

During the fall and winter of the 1976-77 school year, the parties commenced negotiations for an initial agreement. Each of the parties submitted a comprehensive proposed faculty master agreement. Included in the parties' proposals were provisions which specifically concerned the selection of department chairpersons, their salaries, monthly stipends, and job duties.

On February 23, 1977, the District submitted its initial proposal to the Association. It also announced that, effective fall 1977, a college reorganization plan would be implemented. Principally the plan called for the reorganization of the college's instructional areas. Historically, the college had been divided along department lines. Each of the 27 departments was headed by a chairperson who was appointed for a four-year term.3 Chairpersons were recommended for appointment by their respective department faculty, subject to the final approval of the District administration. Department chairpersons were required to perform administrative duties in lieu of full-time teaching responsibilities.4 The proportion of time chairpersons performed administrative duties was dependent upon the size of the department and the administrative duties required. In the large departments, the chairpersons were relieved of all teaching duties.

The chairpersons served a ten-month assignment and received monthly stipends in addition to their regular faculty pay. The amount of the stipends varied depending upon the nature of the administrative duties they were required to perform.

The reorganization plan created a divisional structure, with each of eight instructional divisions headed by a division chairperson. The new division chairpersons would be on a level comparable to that of associate dean and would therefore be excluded from the certificated unit. They also had no teaching responsibilities and worked a 12-month year. Most of the administrative duties previously performed by the department chairpersons would be transferred to the division chairpersons.5 In addition, the division chairpersons would exercise first-line management responsibility in collective bargaining matters.

Subordinate to the division chairpersons would be four "coordinators" who were assigned exclusively to non-teaching administrative duties in certain specified departments of the college. They would receive a $150 monthly stipend in addition to the salary established by the teacher salary schedule.

Subordinate to the coordinators would be 28 department chairpersons who would receive a uniform monthly stipend of $200 and teach 10 months a year with a full courseload. They were to continue to perform some of the administrative duties previously assigned to them.

On March 8 and 10, 1977, the Association requested to negotiate the reorganization plan. The District notified incumbent department chairpersons that it intended to release them from their chairmanships and assign them to teach full-time effective February 8, 1978. The board, on March 23, 1977 rejected the Association's negotiating request, characterizing the Association's demand as one to negotiate a matter outside of the scope of representation.

On April 7 and 11, the Association again demanded that the District bargain over the proposed changes in the compensation and job duties of department chairpersons.

On April 14, 1977, the chairperson of the District bargaining team again rejected negotiations on

this subject, informing the Association that assignments were not within the scope of representation.

On May 18, the District board of trustees approved the proposed reorganization and a plan for its implementation was approved on June 22, 1977.

DISCUSSION

The Board has long held that an employer may violate its duty to negotiate in good faith by making unilateral changes of matters within the scope of representation. *Pajaro Valley Unified School District* (5/22/78) PERB Decision No. 51, 2 PERC 2107; *Grant Joint Union High School District* (2/26/82) PERB Decision No. 196, 6 PERC 13064; accord *NLRB v. Katz* (1962) 369 U.S. 736 [50 LRRM 2177].

As noted above, the District's reorganization plan called for the creation of the new non-bargaining unit position of "division" chairperson and the transfer of work previously performed by bargaining unit members to those employees. In addition, it eliminated the worktime alloted to "department" chairpersons to perform administrative duties and assigned them to full-time teaching duties. These actions, though part of the same reorganization plan, are analyzed separately below.

The Creation of Division Chairpersons

In *Alum Rock Union Elementary School District* (6/27/83) PERB Decision No. 322, 7 PERC 14184, the Board, applying the test for negotiability set forth in *Anaheim Union High School District* (10/28/81) PERB Decision No. 177,6 5 PERC 12148, found that "where management seeks to create a new classification to perform a function not previously performed . . . by employees . . . it need not negotiate its decision." However, as the Board indicated in *Alum Rock, supra,* at p. 11, "those aspects of the creation . . . of a classification which merely transfer existing functions and duties from one classification to another involve no overriding managerial prerogative," and are, therefore, negotiable. Thus, where the assignment of duties to employees would transfer work previously performed by bargaining unit members out of the bargaining unit, the employer is obligated to negotiate. *Rialto Unified School District* (4/30/82) PERB Decision No. 209, 6 PERC 3113; *Solano County Community College District* (6/30/82) PERB Decision No. 219,7 6 PERC 13154.

In this case, the record indicates that the reorganization plan assigned specific administrative duties previously performed by department chairpersons to division chairpersons. Virtually the only duty assigned to division chairpersons that was not previously performed by department chairpersons involved first-line management responsibility in collective bargaining matters. Thus, the District was free to create the new position of division chairperson to perform the collective bargaining function not previously performed. However, aside from this one duty, the District's decision to create a new position outside of the certificated bargaining unit had the effect of transferring work previously performed by bargaining unit members to employees outside of the unit. Prior to the District's assignment of those duties to the newly created classification, it was obligated to negotiate with the Association, upon demand, that transfer of unit work. The District's refusal to negotiate constituted a violation of its duty to negotiate in good faith.

The Change of Hours of Department Chairpersons

The hearing officer found that there was no evidence in the record to support a finding that the District's planned elimination of department chairpersons' non-teaching administrative duty time and their assignment to full-time teaching duties affected their hours of employment. We find, to the contrary, that the evidence establishes that the change in duties of department chairpersons caused an increase in their hours of employment.

The District's reorganization plan, by its own terms, expressly requires that department chairpersons perform many of their preexisting administrative duties, despite the fact that they are assigned to teach on a full-time basis. James Simpson, the District's vice president of business

services, acknowledged in his testimony that the hours of department chairpersons would be affected by the reorganization plan. Moreover, in its communications with the District, the Association specifically indicated that the reorganization plan would increase the hours of employment of department chairpersons, while simultaneously eliminating non-teaching time formerly allotted to them to perform those duties. We therefore conclude that the District's formal adoption of the reorganization plan,8 insofar as it effectively increased the hours of employment of department chairpersons, constituted an unlawful unilateral change of matters within the scope of representation.

The record thus establishes that the reorganization plan, as adopted by the District, affected the wages and hours of department chairpersons. In addition, it transferred unit work to non-unit members. The District's unilateral adoption of those portions of the plan found to affect matters within the scope of representation therefore constitutes a breach of its duty to negotiate in good faith in violation of subsection 3543.5(c) and, concurrently, subsection 3543.5(a) and (b) of the Act. *San Francisco Community College District, supra.*

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the Mount San Antonio Community College District shall:

A. CEASE AND DESIST FROM:

1. Refusing and failing to negotiate in good faith with the Mount San Antonio College Faculty Association, CTA/NEA, on all matters within the scope of representation and, specifically, by unilaterally modifying the stipends of department chairpersons, changing their hours of employment, and transferring unit work to non-unit members.

2. Interfering with the rights of employees to be represented by unilaterally modifying the stipends of department chairpersons, changing their hours of employment, and transferring unit work to non-unit members.

ø3. Denying the Association its rights to represent unit members by failing and refusing to meet and negotiate on all matters within the scope of representation and, specifically, by unilaterally modifying the stipends of department chairpersons, changing their hours of employment, and transferring unit work to non-unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

1. Upon request of the Association, meet and negotiate with the Association concerning the transferring of unit work, the modification of department chairperson stipends, and the change of hours of department chairpersons.

.2 Pay to the affected employees the difference in wages between that which they earned and that which they should have earned in the absence of the employer's unilateral action, minus any mitigation, from May 18, 1977 until the occurrence of the earliest of the following conditions: (a) the date the District negotiates an agreement with the Association concerning the issues raised by this Decision; (b) a bona fide impasse in bargaining occurs; or (c) failure of the Association to request bargaining within 5 days of this Decision.

3. Within 10 days after issuance of this Decision, prepare and post copies of the Notice to Employees, attached hereto, at all school sites and *all* other work locations where notices to certificated employees are customarily placed. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Notify the Los Angeles regional director of the Public Employment Relations Board, in writing, within 45 days of issuance of this Decision, of the steps the District has taken to comply

herewith.

This Order shall become effective immediately upon service of a true copy thereof on the Mount San Antonio Community College District.

Chairperson Gluck and Members Tovar and Burt joined in this Decision.

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[1] The Educational Employment Relations Act is codified at Government Code section 3540 *et seq*.

Unless otherwise noted, all subsequent statutory references are to the Government Code.

Section 3543.5 provides in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[2] Since no exception was taken to the hearing officer's finding that the District unlawfully altered the stipends of department chairpersons in violation of subsection 3543.5(c), we adopt it as the finding of the Board. The hearing officer declined to find that this conduct constituted a concurrent violation of subsection 3543.5(b), citing the Board's decision in *Magnolia School District* (6/27/77) EERB Decision No. 19, 1 PERC 258. Subsequent to that decision, in *San Francisco Community College District* (10/12/79) PERB Decision No. 105, 3 PERC 10127, the Board held that an unlawful unilateral change in violation of subsection 3543.5(c) concurrently violates subsections 3543.5(a) and (b). Accordingly, we find that the District's unilateral modification of the stipends of department chairpersons constitutes a concurrent violation of subsections 3543.5(a) and (b).

[3] The department chairpersons were included in the certificated unit by mutual agreement of the parties without benefit of PERB hearing to determine the appropriateness of the unit. While the Board has had, since its inception, a policy of approving bargaining units reached by mutual agreement, such approval does not necessarily mean that the agreed-upon unit would be found appropriate pursuant to a PERB hearing. (Section 3544.1.)

[4] The administrative duties of department chairpersons included: "assisting" in interviewing and hiring of certificated, classified, and student employees; supervising and evaluating certificated, classified and student employees; scheduling courses; making assignments to cover absences; budget planning and implementation; ordering, storing, and maintaining equipment and supplies; submitting time sheets of classified and student employees; "leadership" within the department for planning and developing curriculum; conducting monthly department meetings and preparing minutes; planning, developing, and implementing student recruitment procedures; assisting students in class scheduling

and student/teacher relations; keeping the dean of faculty personnel informed of leaves of absence and changes in teaching assignments; serving on advisory committees; assisting with revision of the catalog; orientation of new faculty members; conducting in-service training sessions; evaluating and revising course offerings and outlines; helping to select new textbooks; consulting with library, study skills, and audio-visual personnel in developing learning center resources; coordinating curricular offerings with other departments; participating in annual projections for enrollment and staffing; handling correspondence; and assisting with development of building plans. (See Charging Party Exhibit 12, "Major Duties of Department Chairpersons.")

5 Charging Party Exhibit No. 12, entitled, "Major Duties of Department Chairpersons" lists 26 obligations of department chairpersons. This list represents the duties delegated to the department chairpersons prior to the reorganization. Charging Party Exhibit No. 13, entitled, "Reorganization of the Instructional Areas," dated March 28, 1977, at p. 15, lists the responsibilities of division chairpersons. That list of some 34 obligations of division chairpersons demonstrates a virtual transportation of duties from the former department chairpersons to the division chairpersons.

6 Cited, with approval, by the California Supreme Court in *San Mateo City School District; Healdsburg Union High School District et al v. PERB* (1983) 33 Cal.3d 850, 7 PERC 14194.

7 In his dissent, Member Morgenstern argues that management should be permitted to unilaterally remove what he terms "supervisory work" from the bargaining unit. We find no statutory or case authority whatsoever to support this theory. The performance of "supervisory duties" is *only* relevant to a determination of whether an employee should properly be excluded from the bargaining unit as a "supervisory employee" within the meaning of subsection 3540.1(m). In the absence of a determination by the Board that a particular employee is supervisory, that employee *and* that employee's duties belong to the bargaining unit. This is true regardless of whether some part of those duties may involve supervisory functions.

Under the theory set forth in the dissent, management could effectively circumvent the statutory unit modification procedure, while shifting the burden to the union to prove that management had acted improperly. Thus, if management were to unilaterally remove so-called "supervisory duties" from the bargaining unit, the union's only recourse would be to file an unfair practice charge, alleging that management unlawfully transferred bargaining unit work out of the unit. The burden of proof would fall on the *union* to establish that the particular duties transferred were "non-supervisory." In contrast, under the unit modification procedure, when management seeks to exclude an employee from the bargaining unit as supervisory, the burden of proof rests on the *employer* to establish that an employee possessed sufficient indicia of supervisory status.

Moreover, contrary to Member Morgenstern's assertions, the record is not at all "clear" that the duties transferred from the department chairpersons to the new management positions were in fact supervisory. His conclusions are based largely on a list of duties contained in a job description, without any evidence of what duties those employees *actually* perform. Thus, even were we persuaded to adopt Member Morgenstern's legal theory, we could not join him in reaching the factual conclusion, based on this record, that any of the duties transferred from the department chairpersons were supervisory as defined by the Act.

Finally, we note that, in this case, management and the Association mutually agreed that these employees and their duties should be in the bargaining unit (see footnote 3, *supra*). Under the theory offered by the dissent, management may piecemeal, and without bargaining, undo what it

has agreed to respect. We can hardly conceive of a system less conducive to cooperative labor relations.

8 We note that while the changes in this case were filed prior to the effective date of the reorganization plan, the District had *officially* adopted the plan without negotiating, and, as such, had acted in a manner inconsistent with its duty to negotiate in good faith. See *Anaheim Union High School District* (3/26/82) PERB Decision No. 201, 6 PERC 13078; *Newark Unified School District* (6/30/82) PERB Decision No. 255, 6 PERC 13164.

Member Morgenstern, concurring and dissenting: I concur with the majority that the District's unilateral adoption of the reorganization plan unlawfully changed the wages and hours of department chairpersons. I further agree that, under the authority of *Rialto, supra*, and *Solano, supra*, the District violated the Act to the extent that it transferred *bargaining unit work* to employees outside of the unit. However, I dissent from my colleagues' characterization of the duties at issue here as categorically bargaining unit work.

The record indicates that many of the duties transferred from department chairs to division chairs were supervisory in nature, that the decision to transfer duties was made not for any discriminatory purpose but solely to improve supervision by consolidating supervisory functions in supervisory personnel, and that the transfer of duties did not eliminate or reduce the number of department chairperson positions in the unit. In these circumstances, I find that the District's assignment of supervisory duties to supervisors (as opposed to the change in wages and hours of department chairs) was a matter of managerial prerogative, about which it had no duty to bargain.

Department chairs are members of the certificated staff (faculty) unit whose primary function is teaching. According to the District's rules and regulations, department chairs:

> . . . are immediately responsible for the maintenance and improvement of teaching effectiveness. They are a very important link in the chain of communication between the Administration and the Faculty . . . .

The Association's view of the role of department chairs is reflected in its contract proposal on the subject, which states:

> The Department Chairperson shall act as a spokesperson for the faculty in the department he represents. It is the duty of the chairperson to . . . forward all department decisions and recommendations to the appropriate College Officer and to speak for the faculty of the department in dealing with the College.

That department chairs owe their primary allegiance to the bargaining unit is further reflected in the fact that they are effectively elected by the members of their department.

Nonetheless, department chairs had been assigned a variety of duties which are supervisory in nature, and which are acknowledged as such by both parties.1 These duties are among those listed in footnote 4, page 5, of the majority decision.

While the performance of supervisory duties incidental to their primary teaching function does not necessarily render the department chairs "supervisors,"2 *neither does the performance of such duties by unit members convert supervisory duties to bargaining unit work.*

The majority would require that management negotiate with the Association before removing this supervisory work from the unit, while I would require negotiations only on the change in wages, hours and working conditions of unit employees. I reject the notion that nonsupervisors have any "right" to perform work where, as here, it is clear that the work is supervisory in nature.3

The Act mandates a clear distinction between supervisory and nonsupervisory employees, requiring that they form separate bargaining units, represented by different employee organizations.4 While this provision differs from the National Labor Relations Act, the Board has previously held that the intent of the two Acts is the same:

> . . . to protect management's interest in the undiluted loyalty of those employees to whom it delegates supervisory responsibilities and to guard against potential conflicts of interest between supervisors and the employees they supervise. *Sacramento City Unified School District* (3/25/80) PERB Decision No. 122, at p. 13.

Consistent with this legislative intent, the federal labor board has recognized that an employer "is entitled to make its own decisions as to how best to supervise its operations" (*Hydro Conduit Corporation* (1981) 254 NLRB 433, 441), including the unfettered right to determine the size and composition of its supervisory staff and the choice of supervisory personnel. *KONO-TV-Mission Telecasting Corporation* (1967) 163 NLRB 1005, 1008. In accord, see *Camden Fire Department* (1982) 8 NJPER 13137; *Board of Education, City of New York* (1972) 5 PERB 3054.

As the majority points out, it is well established that an employer exceeds its unilateral authority if it promotes employees out of the bargaining unit into supervisory positions with a resulting loss of bargaining unit jobs. *Lutheran Home of Kendallsville, Indiana* (1982) 264 NLRB No. 74; *Tesoro Petroleum Corp.* (1971) 192 NLRB 354, 359; *Kendall College* (1977) 228 NLRB 1083, 1088; *Oil Workers (OCAW) v. NLRB* (1976) 92 LRRM 3059, 3064; *Bay State Gas* (1980) 253 NLRB 538; *Pilot Freight Carriers* (1975) 221 NLRB 1026; *Central Cartage* (1978) 236 NLRB 1232, 1258; *Northport Union Free School District* (N.Y. 1976) 9 PERB 3003. However, the reliance by the majority and majority concurrence on this point is misplaced, as here the District did not remove any employees from the unit; this possible alternative was suggested only by the Association. (See fn. 1, *supra*, at p. 16.) Rather, the course followed by the District did not disturb the unit's composition. All 27 department chairs remained in the unit and retained their teaching, liaison and advocacy functions.

Further, I take issue with the majority's view of the relevance and negotiability of supervisory duties. The majority asserts (fn. 6, p. 9) that:

> The performance of "supervisory duties" is *only* relevant to a determination of whether an employee should properly be excluded from the bargaining unit as a "supervisory employee" within the meaning of subsection 3540.1(m). In the absence of a determination by the Board that a particular employee is supervisory, that employee *and* that employee's duties belong to the bargaining unit. This is true regardless of whether some part of those duties may involve supervisory functions. (Emphasis in original.)

This severely restricted definition of supervisory duties will, if it prevails, seriously limit management's ability to supervise its operations.

In this case, the Association had sought a faculty unit which included department chairs, and the District had agreed. Later, when the District found that its reliance on unit members for the completion of key supervisorial tasks interfered with its ability to manage, a new supervisory class was created and supervisory duties were assigned to the employees in the new class.5

Management has the right to have supervision performed by supervisors with "undiluted loyalty" and no "potential conflict of interest." The majority suggest that the District could achieve this goal through a unit modification. I find nothing in the law that requires the District to pursue such a potentially disruptive course. A unit modification may be looked upon by the District in this situation as harmful for any number of reasons. It may find it disruptive of the excellent collegial relationship between department chairs and other faculty that seems to exist in this District, it may be understandably reluctant to argue that these elected department chairs are or should be its first line of supervision, or the District may simply believe that the establishment of higher level first line supervisors (division chairs) represents better management. The District should not be required to seek a unit modification that it finds contrary to its interest; yet the majority decision leaves only that course open to it in its efforts to achieve a legitimate managerial goal.

The majority concurrence asserts that " . . . nothing in the Act . . . empowers an employer to partition an employee (or classification) into excludable and includable halves." In fact, partitioned classifications do exist. However, the Chairperson's main point here is quite correct; halving an employee would seem to be at best impractical. It is nevertheless true (perhaps especially true in the public sector) that employees will often perform supervisory duties and also spend a good deal of time doing the same work as bargaining unit employees. Because you cannot divide an employee in two, I believe a proper interpretation of section 3545 would allow management to relieve employees in the bargaining unit of their supervisory responsibilities.

I agree with the majority that the change in hours and wages of department chairs is negotiable. The issue between us is that the majority asserts that no work can be removed from the unit unilaterally, while I find that this principle should not apply with respect to duties that are truly supervisory in nature. The majority incorrectly alleges that this approach would put the burden on a union to prove that the duties changed were not supervisory. The more logical and likely approach is to view any unilateral change in duties as unfair unless, as here, management's defense proves the changed duties to be supervisory. Management can hardly exercise the right to "make its own decisions as to how to best supervise its operations" (*Hydro Conduit, supra*) if it must bargain over the right to create a supervisory class or to assign supervisory duties to supervisors. Unlike the unilateral change in wages and hours, I find that the transfer of supervisory duties from a unit of rank-and-file employees to supervisory employees is not in itself conduct that violates either employee or organizational rights guaranteed by the Act. I, therefore, decline to join in the majority's unwarranted extension of the rule stated in *Rialto, supra,* and *Solano, supra*, to the facts of this case.

_____

1 Charging Party Exhibit No. 33 ia a "Notice of Possible Release from Administrative or Supervisory Position" sent to all department chairs to inform them of the District's "intention to reassign you to classroom or other appropriate non-supervisory certificated duties."

Charging Party Exhibit No. 39 is the Association's response to the proposed reorganization in which it acknowledges:

> . . . the possible alternative of a change in the composition of the bargaining unit in that the department chairpersons could form a supervisory unit . . . .

2 Subsection 3540.1(m) provides:

> (m) "Supervisory employee" means any employee regardless of job description, having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

And see *New Haven Unified School District* (3/22/77) EERB Decision No. 14, 1 PERC 121, finding that high school department heads are not supervisors within the meaning of subsection 3540.1(m). (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.)

3 The majority does not find it clear that the work is supervisory. It is true that the parties fail to deal specifically with the question of whether or not the supervisory tasks performed by department chairs require the use of independent judgment. However, the record shows that the District asserted and the Association agreed that department chairs

performed numerous very specific supervisory tasks. Moreover, in response to the District's desire to have these tasks (including the evaluation and adjudication of grievances) performed by non-unit employees, the Association contended that department chairs did these supervisory tasks so well that no change was called for. As noted, *supra*,the Association also suggested the creation of a supervisors unit. Thus, the majority assertions notwithstanding, the evidence that the tasks being removed from the unit are supervisory is uncontroverted in the record.

4 Section 3545 provides, in pertinent part, as follows:

> (b) In all cases:
>
> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.
>
> (2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the District and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

5 The District's Reorganization Plan lists the following among the advantages of the divisional structure:

> 1. A logical chain of command for the processing of grievances would be provided . . . .
>
> 2. Administrators (managers) would be provided out of the instructional areas for purposes of evaluation. At present, all evaluators are in the faculty bargaining unit and there is no effective evaluation by management.
>
> 3. Division chairpersons would provide the Board with more management manpower in case of strikes, slowdowns, sick-ins, or other concerted activities by employee organizations.
>
> 4. Eight division chairpersons could be better and more easily trained in contract management to avoid formal grievances and unfair labor practice charges . . . .
>
> 5. Division chairpersons would be an invaluable resource to the Board in all present or future negotiations . . . .
>
> 6. Division chairpersons would greatly improve our control of work hours, submission of required reports needed for management, and control of leaves and absences.
>
> 7. Division chairpersons would provide District with more consistency and uniformity of administration of Board Rules and Regulations and administrative procedures.
>
> . . .
>
> 10. Division chairpersons would be management personnel, not selected by their constituents, not serving as the advocate of and at the whim of the faculty, and therefore would be much more responsible to the Board and to Management policies and procedures.

Gluck, Chairperson, concurring: The bargaining unit here was established by agreement between the parties pursuant to the authority for such arrangements found in EERA sections 3544 and 3544.1. Department chairpersons were included in the unit by that agreement. The alleged supervisory duties were performed by these employees at that time. Whether such an agreement should have been made in light of the proscription of mixed units by section 3545 cannot be determined from the record. Despite the confident assertions in the dissenting opinion, the record of supervisory duties is found only in job specifications couched in general and inconclusive language.1

Subsection 3540.1(m) clearly acknowledges that the mere existence of duties which are apparently supervisory in nature does not in itself require that employees charged with such responsibilities be excluded from nonsupervisory employee units. To the contrary, it includes in the definition of supervisory employee only those who use independent judgment and exercise their authority in other than routine manner.2

In deciding whether to issue a complaint based on unfair practice charges, PERB has never considered whether the unit in which the dispute arose is "appropriate." Possibly, in light of the prevalence of long-existing, *voluntarily* created units, the Board has been sensitive to the enormous potential for disruption of established bargaining relationships throughout the public school system if it were to first test the appropriateness of such units against the criteria it must apply when dealing with a petition for the establishment of a unit. (See section 3545, *supra*.) To permit a modification of the unit here by its decision in this unfair practice case, could open the door to just such mischief in the future.

The Board has not been insensitive to the possibility that circumstances may require the adjustment of existing units. It has provided a liberal regulation which authorizes the parties to agree to unit modifications without PERB approval, a policy in harmony with sections 3544 and 3544.1. Where agreement is not reached, its regulation 327813 authorizes an employer to petition the Board for appropriate relief.4

These considerations aside, it is my belief that the dissent overlooks the full meaning of section 3545. An employee who performs truly supervisory duties is a supervisory employee. This is true even though he or she also performs non-supervisory functions. I find nothing in the Act which empowers an employer to partition an employee (or classification) into excludable and includable halves.

Nor do I think that the issue here is whether the performance of supervisory duties converts such duties into bargaining unit work. Rather, it is whether an employer, who by his voluntary agreement with a recognized employee organization has himself defined the unit and the work to be performed therein, should be allowed to unilaterally make the kind of changes made here. In *Alum Rock, supra*, we held, as we do here, that reclassification is subject to negotiation. It is no less important that the alteration of an existing bargaining unit not be left to the unilateral determination of a party to the bargaining relationship.

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1 The Association's ambiguous references to the department chairs' satisfactory performance or its suggestion that a supervisory unit be established, do not convert this material into "uncontroverted evidence" that the employees in question are supervisors within the meaning of the Act.

2 This section also makes it clear that "job descriptions" are not to be controlling in the determination of supervisory status.

3 PERB's rules and regulations are codified at California Administrative Code, title 8, section 31001, *et seq.*

[4] The dissent's concern for the District's possible reluctance to upset its collegial relationships if it were to seek unit modification is laudable but does not change the fact that the District's other option is to sit down with the employees' representative and reason out a solution to its problem, a process most suitable to the maintenance of satisfactory employee relationships. In any event, nothing in the majority decision suggests that the District's interests are beyond redemption, as the dissent seems to imply.